him from 1945 to 1952 are presumably taken from the audited accounts which were in existence at the time of the settlement, were referred to in paragraph 2 of the terms of settlement, and which eight years later have not apparently been queried. The plaintiffs have produced no evidence to show that the figures produced by the defendant are not obtainable from those accounts, nor that they are in any other way wrong. It seems to me, therefore, that the assessment of commission can be based on these figures.

There is a sum remaining in Court from which the commission can be paid. It must be borne in mind however that the defendant is entitled to two-fifths of this sum, so that two-fifths of any commission paid to him out of this sum will be paid out of his share. Put in another way an order for payment of commission of 5% will mean a net gain to the defendant of 3% This is the mechanical adjustment to which Murison C.J. was referring.

In my opinion the facts that the defendant managed his own properties which were in the general area of those of the estate and that there were persons employed to look after the estate properties are facts which should be taken into consideration when assessing the commission in this case. I think that the defendant will be adequately recompensed if I allow him commission at 3% on the amount of $897,726.58, which will give a figure to the nearest $100 of $26,900 (which adjusts itself mechanically to a figure of $16,200).

The costs of this application will be taxed as between solicitor and client and paid out of the estate.

Order accordingly.

Solicitors: *Hogan, Adams & Allan; Ong Huck Lim & Co.*

GURBACHAN SINGH v. SEAGROTT & CAMPBELL (No. 2)

[C. A. (Thomson C.J., Hill and Good JJ.A.) August 20, 1962]

[K.L. — F.M. Civil Appeal No. 16 of 1962]

Practice and Procedure — Appeal to Court of Appeal — Appeal not "brought" within time prescribed by O.58 — Service of Notice out of time — Notice of preliminary objection by respondent — R.S.C., 1957, O.58 rr.1A(1), 2 and 15 — Construction of r.15.

At the trial in this case the judgment was delivered on April 3, 1962. Notice of appeal was filed on 1st or 2nd May, but the notice was not served on the respondents or their solicitors until May 9, 1962. On May 10th the respondents' solicitors sent a Notice of Preliminary Objection to the appellant's solicitors intimating that at the hearing of the appeal they would apply for the appeal to be dismissed on the ground that they were not served with notice of appeal within the time limited for appeal whereby the appellant was in breach of O.58 rr.1A(1), 2 and 15.

The appellant took no steps to obtain special leave of the full Court of Appeal but the respondents took the precaution of asking security for costs which they failed to obtain.

Held: (1) an appeal can only be said to be "brought" within O.58 r.15 when the notice of appeal is served on the respondents. As this was not done within one month from the entry of the judgment, the appeal was out of time, and therefore the preliminary objection must succeed and the appeal should be struck out with costs to the respondents;

(2) the procedure followed by the respondents, that is to say, giving the other side notice at the earliest possible moment and then dealing with the matter when the appeal came on for hearing was the correct one.

Cases referred to:—

(1) *Christopher* v. *Croll* (1885), 16 Q.B.D. 66.

(2) *In re Helsby* [1894] 1 Q.B. 742.

COURT OF APPEAL.

Dato' R. P. S. Rajasooria for the appellant.

A. L. Hills for the respondents.

Thomson C.J. (delivering oral judgment): This is an appeal from a judgment of Mr. Justice Suffian which was delivered on 3rd April, 1962. A preliminary objection has been taken by the respondents and we must deal with that *in limine*.

What happened was this. Judgment was entered on 3rd April and notice of appeal against that judgment was filed on the 1st or 2nd of May. The notice was not, however, served on the respondents or their solicitors until the 9th of May. It is said that by reason of that the appeal was not brought within the time prescribed by Order 58 and therefore cannot be proceeded with except by special leave of the full Court of Appeal which has not at any time been asked for.

The relevant rules are rules 1A(1), 2 and 15. Rule 1A(1) says :—

" Appeals to the Court of Appeal shall be by way of re-hearing and shall be brought by giving notice of appeal."

Rule 2 says :—

" Notice of appeal shall be served on all parties directly affected by the appeal.....at the time of filing the notice of appeal."

Rule 15 says :—

" No appeal shall, except by special leave of the full Court of Appeal, be *brought* after the expiration of one month —".

The meaning of the word "brought" was considered by the English Court of Appeal in the case of *Christopher* v. *Croll*.(1) That was a case arising under the old English Order LVIII rule 15, that is the rule as it existed before 1955, which said :—

" Except with the leave of the Court or judge by whom the judgment or order appealed from was given or made, or of the Court of Appeal, no appeal from any interlocutory order shall be brought after the expiration of fourteen days."

In relation to that Lord Esher, M.R., said :—

" Rule 1 of Order LVIII says that 'all appeals should be brought by notice of motion', and rule 15 provides that no appeal from a final judgment in an action shall be 'brought' after the expiration of a year. This seems

to show that the appeal is 'brought' when the notice of appeal is served on the respondent."

To my mind that case is fully in point and I have no hesitation in following it in the construction of our own rule 15.

If the matter stood there, that would be the end of it. It is not, however, quite the end of it because an argument has been based upon certain subsequent proceedings. What happened was that on 10th May, that is as soon as the matter came to their notice, the respondents' solicitors sent a notice to the appellant's solicitors the receipt of which is admitted. It is headed "Notice Of Preliminary Objection", and it reads :—

"TAKE NOTICE that at the hearing of this appeal at the sitting of the Court of Appeal at Kuala Lumpur which commences on Monday, the 20th day of August, 1962, we shall apply for this appeal to be dismissed on the grounds that we were not served with notice of appeal within the time limited for appeal whereby the appellant is in breach of Order 58 rule 1A(1), Order 58 rule 2 and Order 58 rule 15."

When I refer to the printed list of Court of Appeal sittings signed by the Registrar which is a reproduction of what appeared in the Government Gazette I observe that the first scheduled sitting of the Court of Appeal after 10th May is 20th August, that is to-day.

Thereafter, whether advisedly or not, no steps were taken by the appellant to obtain special leave but in the meantime the respondents' solicitors took the precaution of asking security for costs which they failed to obtain.

For myself I can see here no grounds for saying the respondents have waived their right to take the present point.

In effect what they have said is this. We have given you notice that when the appeal comes on for hearing we shall argue that, irrespective of its merits, it has not been properly brought in time and so should be struck out. But in case we should fail and have to fight the appeal on its merits then we ask for security for costs.

In my view the preliminary objection must succeed and the appeal should be struck out with costs to the respondents.

Before departing from the case I should observe that the procedure followed by the respondents, that is to say giving the other side notice at the earliest possible moment and then dealing with the matter when the appeal comes on for hearing seems to be the course that was followed and certainly not disapproved of in the case of *In re Helsby.*(2)

Appeal struck out.

Solicitors: *R. P. S. Rajasooria; Donaldson & Burkinshaw.*

HUP SENG CO. LTD. v. CHIN YIN & ORS.

[O.C.J. (Suffian J.) August 20, 1962]

[K.L. — Civil Suit No. 457 of 1961]

Company Law — Requisition for general meeting under s.115 of the Companies Ordinance — Failure by directors to convene meeting — Meeting called by requisitionists under s.115(3) — Notices of requisitionists' meeting — Failure in notices to comply with Articles of Company — Effect of such failure — Companies Ordinance, 1940, s.115(1), (2) and (3).

Some dissatisfied members of a company registered under the Companies Ordinance served a requisition on the directors under section 115 of the Ordinance to call a general meeting. The draft resolutions to be discussed at the meeting were sent with the requisition. The directors having failed to call a meeting in due time, the requisitionists under the provisions of section 115(3) of the Ordinance proceeded to convene a meeting themselves. In the notices that were sent out by the requisitionists for their meeting, the date, time, place of the meeting were specified and additionally it was stated "the business before the meeting will be to discuss and vote upon the resolutions set out in the notice of requisition." No copy of the notice of requisition accompanied the notices calling a meeting.

In an action by the company for a declaration that the resolutions passed at the subsequent meeting convened by the requisitionists were invalid and of no effect,

Held: the notices calling the meeting failed to comply with Article 61 of the company, in that these notices did not specify the general nature of the business to be transacted at the meeting. This was a fatal flaw to the validity of the meeting and the proceedings of the meeting must be held void and of no effect.

Case referred to:—

(1) *Boschoek Proprietary Co. Ltd.* v. *Fuke* [1906] 1 Ch. 148.

The following cases were also cited in argument: *MacDougall* v. *Gardiner* (1875) 1 Ch. D. 13; *William Irvine* v. *The Union Bank of Australia* (1877) 2 App. Cas. 366; *Imperial Hydrepathic Hotel Co., Blackpool* v. *Hampson* (1883) 23 Ch. D. 1; *Trevor & Anor.* v. *Whitworth & Anor.* (1887) 12 App. Cas. 409; *Browne* v. *La Trinidad* (1888) 37 Ch. D. 1; *Salomon* v. *A. Salomon & Co. Ltd.* [1897] A.C. 22; *Thomson* v. *Henderson's Transvaal Estates Ltd.* [1908] 1 Ch. 765; *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch. 881; *Litvinoff* v. *Kent* (1918) 34 T.L.R. 298; *Short & Anor.* v. *Treasury Commissioners* [1947] 2 All E.R. 298, [1948] 1 K.B. 116; affirmed by H.L. [1948] 2 All E.R. 509, [1948] A.C. 534.

CIVIL SUIT.

M. W. Maxwell (*Yong Joon Hong* with him) for the plaintiff.

T. K. Sen for defendants Nos. 1, 2, 3, 4 & 7.

Defendant No. 5 in person.

Defendant No. 6 since deceased.

Cur. Adv. Vult.

Suffian J.: The sole question here relates to the validity of four resolutions passed at a meeting on 9th July, 1961.

Some hundred or so persons lived on a piece of land, Lot 1995, in the Mukim of Petaling, paying ground rent on their respective plots to the owner, Mrs. Brown. In 1958, desiring to leave the country, she decided to sell the land to the sitting tenants including the trustees of a school existing on the land. We are not concerned here with the one acre on which this school stands. We are only concerned with the